Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

RECEIVED
AUG 3 0 1996
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

DOCKET FILE COPY ORIGINAL

In the Matter of	)	
	)	
Implementation of the Non-Accounting	)	
Safeguards of Sections 271 and 272 of the	)	
Communications Act of 1934, as amended;	)	CC Docket No. 96-149
and,	)	
Regulatory Treatment of LEC Provision of	)	
Interexchange Services Originating in the	)	
LEC's Local Exchange Area	)	

REPLY COMMENTS OF MFS COMMUNICATIONS COMPANY, INC.

David N. Porter
Vice President, Government Affairs
MFS COMMUNICATIONS COMPANY, INC.
3000 K Street, N.W., Suite 300
Washington, D.C. 20007
(202) 424-7709

Andrew D. Lipman
Mark Sievers
SWIDLER & BERLIN, Chartered
3000 K Street, N.W., Suite 300
Washington, D.C. 20007
(202) 424-7500
Fax (202) 424-7645

Attorneys for
MFS COMMUNICATIONS COMPANY, INC.

Dated: August 30, 1996

No. of Copies rec'd 0+11
List ABCDE

Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended;	)))	CC Docket No. 96-149
	)	

REPLY COMMENTS OF MFS COMMUNICATIONS COMPANY, INC.

Table of Contents

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Non-Accounting	)	
Safeguards of Sections 271 and 272 of the	)	
Communications Act of 1934, as amended;	)	CC Docket No. 96-149
and,	)	
Regulatory Treatment of LEC Provision of	)	
Interexchange Services Originating in the	)	
LEC's Local Exchange Area	)	

REPLY COMMENTS OF MFS COMMUNICATIONS COMPANY, INC.

MFS Communications Company, Inc. ("MFS"), by its undersigned counsel and pursuant to Section 1.415 of the Commission's rules, submits these reply comments in response to the above captioned proceeding.

INTRODUCTION AND SUMMARY

The comments and marketplace activities of the Regional Bell operating companies ("RBOCs") indicate that it is important that the Commission promptly establish rules implementing the non-accounting safeguards of Sections 271 and 272.

The RBOCs who provide Internet services are providing interLATA information services without complying with the requirements of Sections 271 or 272.

InterLATA information services, especially RBOC-provided Internet services, are interLATA services. In spite of their comments to the contrary in this proceeding, in the Spring of 1995 when the RBOCs petitioned the MFJ Court for a waiver of the interLATA restriction in order to provide information services, the RBOCs admitted (and vigorously argued) that interLATA transport is an essential element of information services. The MFJ Court did not grant their petition.

In addition to the Section 271 requirements that apply to interLATA services, the separate affiliate requirements of the Telecommunications Act apply to all RBOC-provided interLATA information services. The Commission should reject RBOC assertions that separate affiliate requirements do not apply to interLATA information services provided pursuant to *Computer III*.

The non-discrimination requirements of the Telecommunications Act are more rigorous than traditional discrimination rules that prohibit unreasonable discrimination. Section 272 requires that the RBOCs extend the same services, facilities, access and support systems that it provides or shares with its separate affiliate to any requesting entity on the same terms and conditions.

The separate affiliate requirements of the Telecommunication Act require a meaningful separation of the RBOCs' provision of essential local exchange services and the provision of competitive interLATA services by the separate affiliate. The separate affiliate provisions should create an interLATA affiliate with economic interests that are independent of the RBOC. The Commission should reject the RBOCs' argument that individual employees may provide services at will to either the RBOC or the separate affiliate.

The RBOCs' joint provision of essential local exchange and competitive services creates a potential for anticompetitive pricing. So long as the price of essential services is maintained above economic costs, the RBOCs can drive more efficient rivals out of the market without pricing below costs, without suffering a reduction in revenues or earnings, and without raising the price of essential services. Price caps and imputation do not mitigate this potential. Setting the price of essential services at economic costs, introducing effective competition in essential services markets and separate affiliate requirements that establish fully independent economic interests for affiliates and RBOC parents help mitigate this anticompetitive potential.

I. THE COMMISSION MUST ESTABLISH UNAMBIGUOUS NON-ACCOUNTING SAFEGUARDS TO RESPOND TO RBOC MARKETPLACE ACTIVITIES [¶¶ 31-50]

It is important that the Commission clearly define the activities subject to Sections 271 and 272 and then establish unambiguous non-accounting safeguards implementing Sections 271 and 272. The initial comments clearly reveal a substantial difference of opinion regarding what activities are subject to requirements of Sections 271 and 272[1] and state regulators either are uncertain how to act or are declining to act. For example, the comments revealed that Pacific Telesis and Ameritech formed separate subsidiaries to provide interLATA services and local telephone services.[2] Laboring under a statutory deadline to respond to Ameritech's separate affiliate, the Michigan Commission Staff urged the Commission to provide immediate direction.[3] As MFS noted in its comments, two RBOCs -- Bell Atlantic and Pacific Bell -- already offer Internet services without complying with the Section 271 checklist and without a separate affiliate. Ironically, the planned merger partners of these two RBOCs indicate that they believe RBOCs must employ a separate affiliate to offer interLATA information services.[4] When confronted with Bell Atlantic's Internet offering and the possibility that

---

1/ While some parties, like USTA, argued that the provisions of Section 272 were so clear that they questioned the need for Commission rulemaking, they also typically observed that RBOCs had significant discretion in the types of services offered and the manner in which they could be offered. USTA Comments at pg. 10.

2/ California Cable Television Association Comments at pp. 5-11 and Attachment A; Teleport Communications Group at pp. 3-6; National Cable Television Association Comments at pp. 8-12; Michigan Public Service Commission Staff Comments at pp. 2-3.

3/ Comments of the Michigan Public Service Commission Staff at pg. 5.

4/ Southwestern Bell has proposed to offer Internet services through a separate affiliate. In its comments in this docket, NYNEX wrote that "if a consumer purchases a combined or bundled service consisting in part of an information service and in part of an interLATA service, the combined service should be considered an interLATA information service subject to the separate affiliate
(continued...)

such an offering ran afoul of the requirements of Sections 271 and 272, the Common Carrier Bureau only applied the Commission's existing CEI rules and declined to enforce the statutory separate affiliate provisions of the Telecommunications Act indicating that such issues were better resolved in the context of this rulemaking.[5] While the California Public Utilities Commission recommended that an information service should be considered an interLATA service when it actually involves an interLATA telecommunications transmission component,[6] it seems questionable whether the California Commission is inclined to enforce such a definition given Pacific Bell's existing offering of Internet services with more than 10,000 customers. Since the comments were filed, BellSouth announced plans for its Internet service. Attachment 1 is a copy of its press release describing its offering.

4/ (...continued)
requirement." NYNEX Comments at pp. 8-9.

5/ Bell Atlantic Telephone Companies Offer of Comparably Efficient Interconnection to Providers of Internet Access Services, Order, CCBPol 96-09 at pg. 18 (released June 6, 1996). The Common Carrier Bureau held that "[p]ursuant to Sections 271 and 272 of the Communications Act, BOCs must provide interLATA information services through separate affiliates. The interLATA provision of information services by the BOCs pursuant to Sections 271 and 272 will be considered in a separate proceeding. Bell Atlantic's provision of Internet services on an interLATA basis will be subject to the requirements established in that proceeding."

6/ Comments of the People of the State of California and the Public Utilities Commission of the State of California at pp. 8-9.

The Commission needs to respond to these market place activities. Failure to respond effectively approves the RBOC offerings. However, failure to respond also distorts the market since it adds considerable uncertainty regarding lawful activities.

A. InterLATA Information Services are InterLATA Services [¶¶ 41-48]

Like MFS,[7/] BellSouth argued that interLATA information services are included in "interLATA services" for purposes of applying the requirements of Sections 271 and 272.[8/] While "*interLATA services*" are defined as telecommunications between LATAs,[9/] "*telecommunications*" is defined as the transmission of information without change in the form or content of the information.[10/] In turn, "*information services*" is defined as "offering a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."[11/] Thus, "*interLATA information services*" must logically incorporate the transmission of or capability of transmitting information between LATAs, which is an interLATA service.[12/]

7/ MFS Comments at pg. 10.

8/ BellSouth Comments at pp. 20-23.

9/ 47 U.S.C. § 153(21).

10/ 47 U.S.C. § 153(43).

11/ 47 U.S.C. § 153(20).

12/ The Telecommunications Act makes no distinction between whether that transmission capability is owned or provided by the RBOC or some other entity.

Moreover, in defining when a separate affiliate is required in Section 272(a)(2) Congress used and distinguished between "interLATA information services" and "interLATA telecommunications services" so its reference in Section 271 to "interLATA services" alone must incorporate both "interLATA information services" and "interLATA telecommunications services."

By their previous actions, the RBOCs admit that information services are interLATA services. In the Spring of 1995, the RBOCs filed a petition with the MFJ Court seeking a waiver of the interLATA restriction in order to provide information services.[13/] The RBOCs' expert, Dr. Hausman (who filed an affidavit in this docket on behalf of USTA), wrote that interLATA transmission was an essential element of all major information service providers.[14/] Said differently, according to the economic evidence sponsored by the RBOCs in their petition seeking a waiver of the interLATA restriction, major information service providers do not provide intraLATA-only information services, therefore the RBOCs needed a waiver of the interLATA restriction to compete with such providers. A year later, the RBOCs cannot now claim that their

13/ Motion for a Waiver of the Interexchange Restriction to Permit them to Provide Information Services Across LATA Boundaries, Civ. Action 82-0192 (June 25, 1995).

14/ AT&T Comments at pg. 13, footnote 15 citing Affidavit of Jerry Hausman ("Regardless of the network used, major information service providers almost invariable arrange interLATA access as an essential element of the information service network." (April 24, 1995)) information services are intraLATA in nature in order to bypass the statutory requirements of Sections 271 and 272.

The MFJ Court did not act on the RBOCs' requested waiver. Thus, the RBOCs' provision of interLATA information services cannot fall under the grandfather provisions of Section 271(f). Therefore, the RBOCs are required to comply with Sections 271 and 272 before they can offer interLATA service whether a telecommunications service or an information service.[15/]

Many parties agreed with the Commission that information services should be considered interLATA information services whenever interLATA transmission is an essential component of the service.[16/] However, Pacific Telesis, Bell Atlantic, NYNEX and USTA asserted that if a RBOC service involved interLATA transmission by an interexchange carrier, the RBOC's service was not considered interLATA service.[17/] The analysis is wrong and as illustrated by the structure of Bell Atlantic's Internet offering described in MFS's comments, also subject to abuse by the RBOCs. A RBOC should not be permitted to avoid the requirements of Sections 271 and 272 simply by

---

15/ 47 U.S.C. § 272(a)(2)(B).

16/ Notice at ¶ 44. AT&T Comments at pg. 13; MCI Comments at pg. 17; Pacific Telesis Comments at pp. 11-12; Sprint Comments at pg. 18; US West Comments at pg. 11.

17/ Pacific Telesis Comments at pg. 10; Bell Atlantic Comments at A 3-4; NYNEX Comments at pp. 42-44; USTA Comments at pp. 14-16. See also US West Comments at pp. 9-10.

reselling or repackaging the interLATA transmission services of an interexchange carrier. In order for the RBOCs to provide combined inter/intraLATA offerings without first complying with the Section 271 checklist or the separate affiliate requirements of Section 272, customers must establish a customer relationship with their interexchange carrier that is independent of the services and customer relationship they have with the RBOC. The RBOC information services must not depend on the interLATA services provided by the interexchange carrier. Said differently, if a customer can only use a RBOC information service by combining it with the interLATA transmission services of an interexchange carrier, then the interLATA transmission service is essential to the RBOC's service and the RBOC service should be considered an interLATA service for purposes of Sections 271 and 272.[18]

In their Memorandum supporting their motion for waiver of the MFJ's interLATA restriction in the provision of information services, the RBOCs characterized the Department of Justice as agreeing with the above analysis and the District Court asserting that even incidental interLATA transport is prohibited:

> the Department [of Justice] has stated: "We do not assert that the BOCs' mere use of interexchange telecommunications in connection with the offering of a service necessarily converts that service to an 'interexchange telecommunications service.' [But] [w]here ... the

[18] As Pacific Telesis suggests in its comments, the classification of services should be determined from the vantage of customers' use of services. "If the consumer was using an information service [like the Internet] to exchange e-mail messages with someone in another LATA, that would be an interLATA information service." Pacific Telesis Comments at pg. 12.

> interLATA communications between the customer and the information service are an integral part of the service the BOC is offering for a fee, the BOC is providing interexchange telecommunications service for hire." The district court has declared that even "incidental or auxiliary" transport may be barred.[19]

Moreover, if, under the MFJ, the RBOCs could have provided information services simply by having an interexchange carrier provide the interLATA transport, they would not have needed the waiver they requested in the Spring of 1995. Indeed, the RBOCs described their waiver as "the right to pay existing interexchange carriers to transport BOC information services across LATA boundaries."[20] Since Pacific Bell and Bell Atlantic were joint parties to that waiver, it seems patently disingenuous for them to now argue that they are legally authorized to provide interLATA information services so long as an interexchange carrier provides the interLATA transport.

Internet services clearly involve a combination of information services and a component of interLATA transmission.[21] For a typical Internet service provider, the interLATA transmission component is provided by reselling the very high-speed

---

19/ Memorandum of the Bell Operating Companies in Support of their Motion for a Waiver of the Interexchange Restriction to Permit them to Provide Information Services Across LATA Boundaries, pp. 9-10, Civ. Action 82-0192 (June 25, 1995), citing Department of Justice Bell Atlantic Gateway Brief at 19.

20/ Memorandum of the Bell Operating Companies in Support of their Motion for a Waiver of the Interexchange Restriction to Permit them to Provide Information Services Across LATA Boundaries, pg. 4, Civ. Action 82-0192 (June 25, 1995).

21/ In contrast, US West argues that Internet services are an intraLATA service. US West Comments at pg. 11.

backbone network services ("vBNS") of another firm, or, in the case of Internet service providers who operate their own telecommunications network (*e.g.*, AT&T, MCI, Sprint, Bell Atlantic, Pacific Telesis) the interLATA transmission component could be provided by using their own transmission facilities. The interLATA transmission component is essential to Internet services since customers subscribe to Internet services largely for the ability to access remote information sources and exchange information with other subscribers. Internet services that allow customers to access only information sources or other subscribers within their LATA are virtually worthless.

RBOC-provided Internet services should be declared interLATA services, and the RBOCs should be required to comply with Section 271 and the separate affiliate requirements of Section 272 including prior satisfaction of the full set of checklist requirements.[22/]

[22/] The RBOCs' hired economist, Dr. Hausman also described the Internet as a fundamentally interLATA service when he wrote:

> With this type of network, a user anywhere in the world may access a given information service which is linked to Internet. Given the MFJ restrictions, if the IS [information service] is provided by a BOC and the information crossed a LATA boundary, an MFJ problem could occur. However, the BOC IS computer has no idea where the request comes from Internet. Nor does the information requester know where the ISP [information service provider] computer is. Indeed, the user will typically not even know which network he is on since the computer can access data files from all over the network and other linked networks (*e.g.*, BITNET or NETNorth in Canada) as if the files were on the campus centralized computer. It would not be feasible for the BOC IS

(continued...)

Even if the above analyses were incorrect and even if the RBOCs' previous positions were ignored, RBOC-provided Internet services are clearly interLATA services for purposes of Sections 271 and 272. Section 271(g)(2) defines Internet services provided to elementary and secondary schools via dedicated facilities as "incidental interLATA services." If Internet services were not interLATA services it would be unnecessary to create this exception. As BellSouth recommends in its comments, the Commission should "give effect, if possible, to every clause and word of a statute ... rather than to emasculate an entire section."[23/] To give effect to this statutory exception, RBOC-provided Internet services must be interLATA services.

As a practical matter, and in spite of assertions by some parties that the Commission need not apply Section 272 to intraLATA information services,[24/] instances

---

22/ (...continued)

> computer to instruct Internet that the information must stay, for example, within the San Francisco LATA because the BOC IS computer is in that LATA and the request came from the University of California, Berkeley. Since the data could be sent from Internet to another network and then continue its travels, Internet itself cannot tell where the information will end up.

Motion of the Bell Operating Companies for a Waiver of the Interexchange Restriction to Permit them to Provide Information Services Across LATA Boundaries, Civ. Action 82-0192, Affidavit of Jerry Hausman at pp. 10-11 (June 1993). [emphasis added]

23/ BellSouth Comments at pg. 16, footnote 36 citing *United States v. Menasche*, 348 U.S. 528, 538-39 (1955).

24/ See, *e.g.*, USTA Comments at pp. 14-15.

of entirely intraLATA information services (*e.g.*, a dedicated connection between users and a local public library) that are not covered by the definition of telemessaging or electronic publishing are probably rare.[25] In the interests of efficiency, the Commission should simply declare that RBOC information services are interLATA in nature. The RBOCs could seek a waiver of the Commission's information services rules on a service-by-service basis in those instances where they can show that a particular information service is entirely intraLATA in nature.

B. The Separate Affiliate Requirements of Section 272 Apply to All RBOC-Provided InterLATA Information Services [¶¶ 46-47]

BellSouth and USTA[26] vigorously argue that the Commission is strictly bound by the language of the Telecommunications Act, and that "the Commission may not adopt substantive 'legislative' rules that would conflict with or frustrate achievement of the purposes of the 1996 Act."

> The fact that Congress set forth such details instead of expressly leaving the details for the Commission to complete demonstrates that the structural separation requirements of Section 272(b) are complete unto themselves. By taking this action, Congress made clear its intent that the structural separation requirements are not to be supplemented through Commission rulemaking, other than to specify the manner of maintaining books, records, and accounts. Unlike Section 273, which specifically confers authority on the Commission to supplement the statutory separation scheme with addition structural regulations, Section 272 does

[25] See, *e.g.*, Information Technology Association of America Comments at pg. 10.

[26] USTA Comments at pp. 3-4.

> not give the Commission the ability to adopt substantive structural separation rules.
>
> Given this fact, the Commission has no authority to promulgate substantive legislative rules (other than accounting rules) to implement the structural separation requirements of Section 272(b). The Commission does not have the discretion, in "implementing" Section 272, to add to or deviate from the detailed statutory scheme established by Congress. Thus, a given BOC affiliate is either in compliance with Section 272(b) or its is not. ... Commission regulations cannot change the plain terms of the statute.[27/]

BellSouth is right. The separate affiliate requirements of Section 272 plainly apply to all RBOC interLATA information services (other than electronic publishing and alarm monitoring), interLATA services (other than incidental interLATA services) and manufacturing activities.[28/] The Commission cannot exempt RBOC services from this statutory requirement.

However, BellSouth contradicts its argument by subsequently concluding that "a Section 272 separate affiliate for interLATA information services that can currently be offered pursuant to nonstructural safeguards would discard more than a decade's experience and would turn away from the Commission's long standing conclusions that nonstructural safeguards are more beneficial to the public interest than structural separation."[29/] Distilled to its essential components, BellSouth's argument is that the

27/ BellSouth Comments at pp. 3, 28-29. [emphasis added]

28/ 47 U.S.C. § 272(a)(2).

29/ BellSouth Comments pg. 26 citing *Computer III*.

Commission cannot adopt rules that conflict with the statutory requirements of the Telecommunications Act unless the Commission seeks to apply the separate affiliate requirements on the interLATA information services offered by RBOCs. In the latter case, according to BellSouth, the Commission's past *Computer III* policies should apply, and no separate affiliate requirement should apply irrespective of the plain language of Section 272. Likewise, Bell Atlantic argues that a service provided pursuant to a comparably efficient interconnection ("CEI") plan should be presumed to be intraLATA in nature.[30] Congress did not adopt language that created exemptions for RBOC services offered pursuant to the nonstructural safeguards adopted in *Computer III*. The separate affiliate requirements of Section 272 apply to the RBOCs' provision of interLATA services regardless of whether *Computer III* might otherwise have allowed RBOCs to provide a service on an integrated basis.

Likewise, satisfying the CEI requirements are utterly irrelevant to the classification of services as inter or intraLATA and does not create an exception to the separate affiliate requirements of Section 272. The CEI requirements were never intended to test whether an information service is inter or intraLATA in nature. The CEI requirements merely develop mechanisms to assure that competing information service providers have comparable efficient interconnection with the facilities used by the RBOCs' integrated information services. Satisfaction of the CEI requirements cannot

30/ Bell Atlantic Comments at A 3.

be the legal test for whether an information service is an interLATA service or whether a separate affiliate is required under Section 272.

In fact, under Section 272(h), Congress created a one-year transition period that requires the RBOCs to bring into compliance any pre-enactment activities that do not conform with the separate affiliate requirements created by Section 272. Congress clearly directed that these activities are not exempted simply because they were previously provided on an integrated basis. For example, if RBOCs were providing information services on an integrated basis pursuant to *Computer III* and CEI requirements, Section 272 establishes a one-year transition period to conform those activities to the requirements of the Telecommunications Act. Congress did not choose to grandfather such activities. The language of Section 272(h) is unambiguous, "with respect to <u>any</u> activity in which a Bell operating company is engaged on the date of enactment of the Telecommunications Act of 1996, such company shall have one year from such date of enactment to comply with the requirements of this section."[31]

Some RBOCs argue that any interLATA services that RBOCs were authorized to provide by the MFJ Court are exempt from the separate affiliate requirements irrespective of the one-year transition requirements of Section 272(h).[32] Pacific Telesis, for example, asserts that "Congress would have no reason to apply separation

[31] 47 U.S.C. § 272(h). [emphasis added]

[32] BellSouth Comments at pp. 18-19; Pacific Telesis Comments at pp. 5-6.

requirements to services for which the MFJ Court did not require them"[33] and BellSouth argues that Congress expressly intended to "grant a permanent exemption for previously authorized activities from the separate affiliate requirements of section 272."[34]

Under Section 272(a)(B)(iii), a separate affiliate is not required for activities previously authorized as provided in Section 271(f). Section 271(f) grandfathers those activities "authorized by, and subject to the terms and conditions contained in, an order entered by the United States District Court for the District of Columbia pursuant to section VII or VIII(C) of the AT&T Consent Decree."[35] Thus, the standard for grandfathered activities is a Court order, and not merely the RBOCs' conclusion that a particular service would likely have been approved by Judge Greene. The RBOC provision of Internet services was not approved by an order of the MFJ Court, nor even considered. There is no order authorizing the RBOCs to provide Internet services, so the statutory exception does not apply.

[33] Pacific Telesis Comments at pg. 6.

[34] BellSouth Comments at pg. 19.

[35] 47 U.S.C. § 271(f). [emphasis added]

C. Separate Affiliates Must be Fully Separate [¶¶ 55-64]

The separate affiliate requirements of Section 272(b) are very explicit, setting out five distinct requirements:

(1) the separate affiliate must operate independently of the RBOC;

(2) the separate affiliate and the RBOC must have separate books, records, and accounts;

(3) the separate affiliate and the RBOC must have separate officers, directors, and employees;

(4) the separate affiliate and the RBOC may not obtain credit under any arrangement that would permit a creditor to recourse to the assets of the RBOC; and,

(5) the separate affiliate and the RBOC shall conduct all transactions on an arms length basis with any transactions reduced to writing and available for public inspection.

Incredibly, USTA asserts that these provisions create "more of an accounting separate affiliate than a separate facilities affiliate."[36] The explicit separate affiliate requirements embodied in Section 272(b) go much further than simply mandating an accounting affiliate. The separate affiliate provisions require a separate affiliate that has economic interests and makes economic decisions independent from the RBOC. The

[36] USTA Comments at pg. 18.

requirements to "operate independently," have "separate officers, directors, and employees" and have separate credit arrangements imply a structure where the affiliate makes economic decisions that are independent of the economic interests of the RBOC.[37] Likewise, the requirement that the affiliate conduct all transactions with the RBOC at arms length implies a very separate, separate affiliate. MFS believes that at a minimum, to assure that the separate affiliate and the RBOC have distinct economic interests, separate operations must be interpreted to mean no customer referrals, no joint marketing, no joint advertising, separate logos, distinct names, no shared customer databases or information systems, and separate billing, collections and ordering processes.

Some RBOCs make an entirely artificial distinction between the requirement for separate officers, directors and employees and sharing services.[38] According to these RBOCs, a RBOC and an affiliate might have separate officers, directors and employees, but they may share the services provided by these workers. The argument is clearly designed to bypass the purpose of establishing separate subsidiaries and would frustrate the purpose of Section 272. It would be meaningless to require that affiliates and RBOCs have separate employees if the employees could perform work at

---

37/ See Excel Telecommunications Comments at pp. 4-5; Information Technology Association of America Comments at pp. 16-20.

38/ BellSouth Comments at pp. 30-31; Pacific Telesis Comments at pp. 21-23; USTA Comments at pg. 21; US West Comments at pp. 22-25.

will for either the RBOC or the RBOC's affiliate. The purpose of requiring separate affiliates would be destroyed if the RBOCs could employ a salesman who provided sales "services" to the RBOC affiliate while the parent RBOC paid the salesman's salary and directed his work efforts. Separate employees, officers and directors should be interpreted simply to mean that such separate employees may provide services only for the the RBOC or only for the RBOC's affiliate and must be on the payroll of the entity for whom he or she works.

D. The Non-Discrimination Standards of Section 272 are More Rigorous than Existing Requirements [¶¶ 65-89]

Some parties argued that the non-discrimination language of Sections 272(c)(1) and (e) prohibits only unjust or unreasonable discrimination.[39] The non-discrimination language of Section 272 goes further. Section 272(c)(1) provides that a RBOC "may not discriminate between that company or affiliate and <u>any other entity</u> in the provision or procurement of goods, services, facilities, and information, or in the establishment of standards." Section 272(e) provides that a RBOC "shall not provide <u>any</u> facilities, services, or information concerning its provision of exchange access to the affiliate ... unless such facilities, services or information are made available to other providers of interLATA services in that market on the same terms and conditions." As MFS argued

[39] See, *e.g.*, BellSouth Comments at pp. 32-33; Pacific Telesis Comments at pg. 29; US West Comments at pp. 31-32.

in its comments, these provisions go further than the Commission CEI and *Computer III* requirements. Under *Computer III*[40] and the Commission's recent Interconnection Order,[41] collocation rights are not extended to information service providers or entities other than telecommunications carriers. However, if an RBOC allows its information service affiliate to collocate routers or servers or other equipment, the language of Section 272 requires that the same collocation facilities, services and accomodations be extended to any other entity. Likewise, if the RBOC provides its affiliate with any information, facilities, or services concerning its provision of local service, it must also provide the information, facilities or services to any providers of interLATA service on the same (not just comparable, as required under CEI) terms and conditions.[42] For example, if the RBOC provides referral services to its affiliate, it must provide the same referral services to other interLATA information providers.

40/ *Filing and Review of Open Network Architecture Plans*, 4 FCC Rcd at 94-95, ¶¶ 181-183 (1988), *recon.*, 5 FCC Rcd at 3092, ¶¶ 69-72 (1990).

41/ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, CC Docket 96-98 at ¶ 582 (released Aug. 8, 1996)

42/ 47 U.S.C. §§ 272(c)(1) and 272(e).

II. THE COMMISSION SHOULD REJECT RBOC ANALYSES OF THE COMPETITIVE IMPLICATIONS OF THE INTEGRATED PROVISION OF ESSENTIAL AND COMPETITIVE SERVICES [¶¶ 108-129]

Some parties opposed the Commission's conclusion not to presume that rates filed by RBOC affiliates were reasonable regardless of whether the affiliate is dominant or non-dominant.[43] Pacific Telesis, for example, argues that if the affiliate is non-dominant, then it does not possess the power to set prices, and thus, the presumption of reasonable prices should be afforded to non-dominant RBOC affiliates.[44] In an affidavit attached to USTA's comments, Professor Hausman argues at length that the RBOCs do not possess sufficient market power that would allow them to harm competition if they provided essential and competitive services on an integrated basis. As MFS demonstrated in its comments, as long as a RBOC controls essential services and as long as the price of such services is maintained at levels substantially above economic costs, a vertically integrated RBOC can leverage its control over these essential services to drive rivals (even more efficient rivals) out of the market without pricing below costs, without raising the price of essential services, without suffering a

---

43/ Notice at ¶ 104; Pacific Telesis Comments at pp. 45-46.

44/ Pacific Telesis Comments at pg. 46. Also see BellSouth Comments at pp. 47-55.

reduction in profits or revenues, and in spite of traditional imputation requirements, price caps or separate affiliate requirements.[45]

Basically, a RBOC affiliate can reduce its prices in the competitive segment of the market to a level that is still above incremental costs (and meets an imputation test), but fails to allow competitors to cover their common costs. When competitors match the RBOC affiliate's lower prices, which they must do to remain competitive, their price reductions stimulate additional demand and traffic. The RBOC that provides the essential service earns additional revenues and margins on the demand and traffic stimulated by its competitors' price reductions. The revenues and earnings on the stimulated traffic can exceed price-related reductions in revenues associated with the RBOC's affiliate's competitive services.[46] As a whole, a vertically integrated RBOC can experience a revenue and profit increase while its more efficient competitors, who must purchase essential services from the RBOC, are driven into a loss situation even though they may be more efficient. As long as the RBOC controls essential services

---

45/ MFS Comments at Attachment 1.

46/ In his affidavit, Professor Hausman described the same phenomena with access services and long distance services. "Moreover, the BOCs will have an economic incentive to lower long distance prices from their current levels. Since prices for both access and long distance are well above incremental (marginal) cost (including access), a BOC has an incentive to lower prices both to gain share from rival IXCs and also to expand the use of long distance so that access minutes increase. IXCs do not have this same incentive because they do not provide access. Thus, lower prices of long distance through an expansion of output, not a restriction of output, will be in the BOCs' best interests." USTA Comments, Hausman Affidavit at pp. 8-9.